No. 82-1600

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

NATIONAL STEEL SERVICE CENTER, INC.,
Respondent,

v.

WILLIAMS GIBBONS, Trustee of the property of the Chicago Rock Island and Pacific Railroad Company,
Petitioner.

BRIEF IN OPPOSITION TO WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

I. Does Federal transportation law and national transportation policy pre-empt the power of the State of Iowa to provide a tort remedy to its citizens in the form of liability without fault when an interstate rail carrier engages in an ultra-hazardous activity?

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JURISDICTION

The jurisdictional statement in the Petition for Certiorari is accurate.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Interstate Commerce Act, 49 U.S.C. § 10103 provides:

> The remedies provided under this subtitle are in addition to the remedies existing under another law or at common law.

The Railroad Safety Act, 45 U.S.C. § 434 provides:

A state may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the secretary has adopted a rule, regulation, order or standard governing the subject matter of such state requirement.

STATEMENT

Although respondent is not in agreement with the characterization of this case as set forth in petitioner's Statement, the differences are not relevant to the issue of whether this Court should grant certiorari with the exception of petitioner's characterization of Iowa law as imposing a civil penalty on a rail carrier and its assertion that *Silkwood* v. *Kerr-McGee Corp., infra,* represents a conflict between the Eighth and Ten Circuits on Federal pre-emption law.

Compensatory damages for victims of an ultra-hazardous activity are not a "penalty" anymore than the same damages are when negligence can be proved. As will be demonstrated below, there is no conflict between the Eighth and Tenth Circuits on Federal pre-emption law as it relates to the imposition of liability without fault. Both Courts have upheld awards on that theory.

REASONS FOR DENYING THE WRIT

The Court Below Correctly Held That Federal Law Does Not Pre-Empt The Imposition Of State Tort Liability Upon An Interstate Railroad Carrier Which Engaged In An Ultra-Hazardous Activity.

Petitioner argues that the Court below erred in allowing respondent to recover damages caused by petitioner's ultra-hazardous activity which severely damaged respondent's property, arguing that the imposition of state tort remedies are preempted by federal law. It is elementary, however, that pre-emption of state law by federal statutes or regulations is not favored. *Chicago & N.W. Transp. Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311 (1981).

Petitioner argues that the Interstate Commerce Act (49 U.S.C. § 10101 *et seq.*), the Hazardous Materials Transportation Act (49 U.S.C. § 1801 *et seq.*), and the Railroad Safety Act (45 U.S.C. § 431 *et seq.*) pre-empts the imposition of liability without fault against petitioner in the context of this case. Petitioner does not, however, cite any case which so holds. To the contrary, each of these statutes expressly contemplates that state tort principles can be applied to common carriers such as petitioner, notwithstanding that Congress has regulated the area in part. The Interstate Commerce Act provides:

> The remedies provided under this subtitle are in addition to the remedies existing under another law or at common law.

49 U.S.C. § 10103. The Railroad Safety Act specifically authorizes state "regulation" of non-federally-regulated activity:

> A state may adopt or continue in force any law, rule, regulation, order, or standard relating to railroad safety until such time as the Secretary has adopted a rule, regulation, order or standard governing the subject matter of such State requirement.

45 U.S.C. § 434. The Hazardous Materials Transportation Act pre-empts only a state requirement "which is inconsistent with any requirements set forth in this chapter . . ." 49 U.S.C. § 1811(a).

Notably absent in each of these statutes is any provision for civil remedies. Congress no doubt has the power under the Commerce Clause to provide such remedies if it so chooses. Congress has expressly chosen not to do so. As a federal district court noted in *Southern Pac. Transp. Co.* v. *United States:*

> . . . '[t]ort law has historically been left to the states and . . . the federal courts should not assume an alteration in that historical approach in the absence of a clear indication of the intent of Congress.

462 F.Supp. 1193, 1217 (E.D.Cal. 1978). That Congress did not intend to pre-empt the imposition of state tort remedies is implicit in the absence of any remedial rights under any of these statutes to persons injured by the activities of a common carrier.

The argument made by petitioner was made and rejected in *Southern Pac. Transp. Co.* v. *United States,* 462 F.Supp. 1193 (E.D. Cal. 1978). There, *Southern Pacific* brought an action against the United States for various damages arising out of the explosion giving rise to the litigation in *Chavez* v. *Southern Pac. Transp. Co.,* 413 F.Supp. 1203 (E.D. Cal. 1976). The issue before the court was whether the Interstate Commerce Act, the Hazardous Materials Transportation Act, and the Railroad Safety Act pre-empted the imposition of state tort rules of contributory negligence in the action by the Southern Pacific against the United States. The trial court thoroughly examined the pre-emption doctrine springing from *Clearfield Trust Co.* v. *United States,* 318 U.S. 363 (1943), and concluded:

> Although the Federal Railroad Safety Act of 1970 and the cases construing it reflect the congressional intent to pre-empt the regulation of railroad safety and achieve national uniformity, no indication is given in the Act or its legislative history that Congress intended to pre-empt state tort liability doctrines affecting the remedies either for violation of the federal regulations in particular, or for railroad related accidents in general. In the absence of such an indication of congressional intent, this court concludes that congress intended no alteration in the prevailing scheme of federal law as it inter-relates with state law. . .

462 F.Supp. at 1226.

In analogous situations, the federal courts have consistently held that federal regulations do not pre-empt the imposition of state tort remedies. *See Raymond* v. *Riegel Textile Corp.,* 484 F.2d 1025 (1st Cir. 1983); *Hubbard-Hall Chem. Co.* v. *Silverman,* 340 F.2d 402 (1st Cir. 1965). In *Rucker* v. *Norfolk &*

Western Ry. Co., 77 Ill.2d 434, 396 N.E.2d 534, *rev'g* 64 Ill. App. 3d 770, 381 N.E.2d 715 (1978), the court rejected defendant's argument that a railroad tank car which complied with federal regulations could not be found defective under the Illinois version of strict products liability. The court specifically found no indication in the federal regulations that Congress intended to pre-empt state tort law by enacting the Railroad Safety Act or the Interstate Commerce Act.

Petitioner seeks to create an ostensible conflict between the Eighth Circuit's decision in the instant case and the Tenth Circuit's decision in *Silkwood* v. *Kerr-McGee Corp.*, 667 F.2d 908 (10th cir. 1981), *petition for cert filed,* No. 81-2159. Petitioner argues that the imposition of tort liability in the instant case is analogous to the imposition of punitive damages in the *Silkwood* case.

It is clear that this case is analogous to *Silkwood,* but not for the reasons petitioner suggests. In *Silkwood,* the jury awarded damages for personal injuries, punitive damages and injury to plaintiff's personal property damaged by plutonium contamination under a liability without fault theory. 667 F.2d at 921. Defendant appealed from this verdict. The Tenth Circuit held that the personal injury award was governed by the State Workmen's Compensation Act and that punitive damages could not be awarded since they would constitute a penalty and were awarded as punishment for bad practices or to deter future practices involving exposure to radiation. The court held that this was an area pre-empted by federal regulation. Judge Doyle dissented from both of these holdings.

However, the Tenth Circuit was unanimous in holding that the award of property damage under a liability without fault theory was proper and did not conflict with the federal regulatory scheme. The Court noted that the Atomic Energy Commission did not have the power to order compensation to a victim of a nuclear incident. 667 F.2d at 920. None of the Acts

relied upon by the petitioner provide for an award to the victim of a railroad accident.

Petitioner's attempt to equate the damages awarded in this case with the punitive damages awarded in *Silkwood* is untenable. The damages awarded respondent in this case are compensatory damages, proximately caused by petitioner's ultra-hazardous activity. The punitive damages awarded in *Silkwood* were intended to punish defendant for its outrageous conduct and to deter it from similar conduct in the future. These damages were in excess of the compensatory damages awarded in *Silkwood*. Because of the regulatory nature of the punitive damages, the Tenth Circuit concluded that the award violated the provisions of the Atomic Energy Act of 1954, 42 U.S.C. §§ 2011-284, which granted the Atomic Energy Commission specific and comprehensive powers to punish and prohibit practices it regarded as improper. The award of compensatory damages in this case, since they are compensatory in nature, does not infringe upon Congress' intent to regulate the railroad industry.

CONCLUSION

There is no intimation in any of the federal legislation that Congress intended to pre-empt the imposition of state tort liabilities on railroads which engage in ultra-hazardous activities. The Iowa Supreme Court has determined that common carriers, including railroads, are not exempt from liability for engaging in ultra-hazardous activities. The award of compensatory damages for such an activity on behalf of the railroad is not prescribed by any federal legislation.

Petitioner has failed to cite any decision of a federal court of appeals in conflict with the decision of the Eighth Circuit in this case; nor has petitioner shown that the decision of the Eighth Circuit Court of Appeals is in conflict with a similar decision by a state court of last resort; nor has the petitioner shown that the

Eighth Circuit so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision. Petitioner's application for a Writ of Certiorari ought be denied.

Respectfully Submitted,

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